

# Role Reversal: Letting Students Ask the Questions in a Criminal Law Class

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## I. INTRODUCTION

In law school, students mostly learn how to answer questions, not pose them.<sup>1</sup> In class, the instructor often poses a series of questions to random students through what has been described as the Socratic Method.<sup>2</sup> There is questioning about cases, where the facts are laid out in neat detail, and about hypotheticals, where casebook authors or the instructor supply the facts for perusal. Outside of class, students are asked questions by authors in their casebooks and by instructors in law school examinations. In short order, students become adept at responding to questions on a moment's notice. Significantly, students need not pose a single question in their entire first year to navigate law school with success.<sup>3</sup>

The dedicated study of questioning technique sometimes occurs in law school courses, but generally not until students take upper-level classes usually designated as electives. These "skills" courses include trial advocacy and pre-trial practice, as well as co-curricular mock trial competitions.

By way of contrast, criminal lawyers effectively rely on their questioning techniques for a living. A primary responsibility of these lawyers is to elicit facts in a wide variety of situations. Criminal law attorneys question witnesses, interview clients, and inquire through formal discovery about the strength and substance of opposing cases. The quality of the questioning is often directly related to the outcomes of the proceedings. Further, lawyers pose inquiries to judges and colleagues to learn more about the expectations of others. Questioning also promotes rapport and collegiality, especially with office cohorts.

Consequently, questioning techniques are functionally important on several different levels. Good questions elicit useful information, particularly facts. Questions become an integral component of dialogues between people and their

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<sup>1</sup> Students have the option in most classes of voluntarily interposing questions, but the questions themselves are usually not examined, either for their substance or timing.

<sup>2</sup> The questioning by the instructor creates a template for learning substantive law rules and principles, understanding those rules and principles, and then applying them.

<sup>3</sup> Students sometimes can get through their entire law school career without asking a single question or being prompted to ask a question.

interpersonal relationships. Questioning also signifies intellectual curiosity, a signpost of cognitive thinking.

## II. OBJECTIVES

The use of questioning skills in the first year of law school has become more relevant over time. While there has been a growing sentiment that legal education is too narrowly focused on cognitive thinking skills,<sup>4</sup> schools have struggled with the question of how to broaden the education within the traditional curriculum. It has been difficult to force cognitive legal analysis to share the stage with other lawyering skills in basic courses, particularly in the first year of school.<sup>5</sup> Incorporating questioning techniques accomplishes this goal with little overall disruption.

Students can be intentionally exposed to the skill and art of questioning techniques<sup>6</sup> within a traditional law school course such as Criminal Law. This exposure offers students a better understanding of facts and their importance and, on a broader level, of what criminal lawyers do. Asking questions provides a link to criminal law practice and helps students improve their own cognitive skills, particularly their organizational ability and writing habits.

## III. METHODS

Since questioning techniques may be parsed and studied, students can be given questioning templates to help guide their usage and practice.<sup>7</sup> In addition, the focus on questioning need not occur as a separate stand-alone event, but can be used in conjunction with other objectives, such as promoting cognitive legal analysis through problem solving. Thus, in a world of limited class time, the incorporation of questioning technique furthers other important lawyering skills, rather than diminishes them.

Students can be taught about questioning through protocols, such as qualities of question design. For example, benchmarks of good questions include clarity, directness and simplicity. Additional emphasis can be placed on the completeness of questions, as well as transition questions and the progression or flow of multiple questions. To foster the relevancy of a discussion about questioning, students can

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<sup>4</sup> See, e.g., WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

<sup>5</sup> Different practices offer the opportunity to expand the learning process, however. See, e.g., ROY STUCKEY, ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

<sup>6</sup> Note, for additional information about this idea, see Steven I. Friedland, *Reversing the Norm: Promoting Student Questioning Proficiency*, in *TECHNIQUES FOR TEACHING LAW* 2, 123 (2011).

<sup>7</sup> If the ability to question is important, students should be given some structure to learn how to improve that ability.

be expressly informed how qualities such as simplicity, clarity and transition relate to the students' written work product, particularly examinations.

In addition, a template might include question types, such as inquiry and advocacy forms. Inquiry type questions are non-leading and open-ended, primarily designed to obtain information from the questioned individual. Advocacy type questions are leading and suggest an answer. With advocacy questions, the questioner effectively is conducting a unilateral conversation, with the question serving as a rhetorical device to make various points. Advocacy questions usually can be answered with a simple "yes" or "no." This distinction coincides with an important dichotomy students learn about in other areas of their first year of law school, specifically the difference between objective analysis and persuasive representation.<sup>8</sup>

The foundation for questioning techniques can be established in as little as ten or fifteen minutes of class-time. Once established, students are ready to participate in an exercise associated with a substantive area of the course. A sample exercise follows.

#### IV. THE EXERCISE: THE TRIAL OF BAKER FOR THE UNLAWFUL POSSESSION OF COCAINE

##### *A. Exercise Goals and Framework*

I use a questioning exercise to engage students in eliciting the facts of a legal problem, in contrast to appellate cases, where the facts are laid out for the students. The exercise is associated with a substantive area of the course, such as inchoate crimes like possession, attempts or conspiracy. In the "Trial of Baker" problem, students must grapple with the elements of possession, as well as the division of possession into joint and sole types, and actual versus constructive possession.<sup>9</sup> Given that there is often debate about whether an accused has wandered across legal lines in the inchoate area, questioning is a useful tool through which to elicit the facts of the case.

##### *B. Possession Problem*

Able and Baker rent an apartment together as 23 year-old college seniors. One day, Able brought a friend, Charlie, to the apartment. Able and Charlie went into Able's room and closed the door, although it popped open a crack. Baker smelled what he thought was marijuana coming out of Able's bedroom and saw

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<sup>8</sup> The distinction between objective and persuasive argument occurs often in legal writing classes and in understanding how attorney briefs and appellate arguments differ from appellate judicial opinions.

<sup>9</sup> These possession issues could just have easily arisen if contraband is found in a car with a driver and at least one passenger.

them smoking something. When Baker went to the refrigerator to get a drink, he noticed a plastic baggie containing white powder resting on the kitchen counter on top of Charlie's book. Baker thought the baggie contained cocaine. Baker got his drink from the refrigerator and went back to his room. Later that afternoon, the police arrived with a valid search warrant. The police found marijuana in Able's bedroom and a baggie of cocaine on the kitchen counter.

Charlie will plead guilty to the unlawful possession of marijuana and cocaine. Baker and Able are being tried separately. Is Baker guilty of the possession of cocaine?

### 1. All-Write.

The setting is the trial of Baker. The students are informed that Charlie has agreed to plead guilty and testify for the prosecution. Charlie is on the witness stand. All of the students will be asked to write down different types of questions for Charlie. Half of the students will act as the prosecutors in the case and the other half of the class will be the defense team.<sup>10</sup> The prosecutors are then divided into half again so that one of the prosecutor groups (really one-fourth of the class) is asked to write down five advocacy questions of Charlie as he testifies on behalf of the prosecution at Baker's trial.<sup>11</sup> The other prosecutor group is asked to write down two inquiry questions of Charlie on the direct examination.

The remaining half of the class, who will act as the defense lawyers, is divided into two groups as well. One group of defense lawyer-students (again, really one-fourth of the students) writes down five advocacy questions of Charlie as part of cross examination on behalf of the defense. The remaining defense lawyer-students write down only two inquiry questions of Charlie for the defense.

### 2. Collaborate.

After the individual all-write, each quartile is then asked to combine into small groups of five or six. Each member of the small group should have written the same kind of question (advocacy or inquiry) for the same party. The groups are instructed to select only two preferred questions from those created by group members based on the principles of questioning techniques.

### 3. Ask.

After allowing a few minutes for students to select preferred questions in a collaborative manner, representative students from each group, time permitting, are asked to pose one or two questions of Charlie. I generally play Charlie, although I

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<sup>10</sup> This exercise works even in large classes. An imaginary line can be drawn down the middle of class to divide the groups.

<sup>11</sup> The numbers five and two are arbitrary, but are used for efficiency purposes.

have asked a student to play the role in the past with success. On direct examination, groups using advocacy questions go first, followed by the groups using inquiry questions. On cross examination, I use the same ordering.

#### 4. Mediate.

My role is to mediate and interject at times when students ask their questions. I ask about the question qualities—Simple? Direct? Clear?—and how the questions relate to proof of possession of cocaine. I try to be observational and non-judgmental.

#### 5. Determine Guilt or Innocence.

At the end of the exercise, I ask the students to write out whether they would find Baker guilty of the possession of cocaine. They must base their verdicts on the facts elicited in the questioning. Then we briefly discuss the substantive aspects of the question.

#### 6. Conclude.

I wrap up the exercise by referring to the broad utility of inquiry and advocacy type questions and ask what their experiences were like in developing these questions. Students come to appreciate the propriety and nature of each type of question.

Note that this type of exercise also is applicable in a wide variety of contexts, such as when students question a client, elicit facts, or evaluate the logic of a particular legal analysis. Questioning techniques can be utilized in many areas of the course and revisited using mock “testimony” in other situations as time permits.

### V. CONCLUSION

Using class time for questioning technique exercises enhances several pedagogy objectives. By intentionally dedicating class time to learning about questioning techniques in criminal law courses, instructors send a message to students about the relative importance of questioning, promote a greater breadth of skills, promote the relevancy of class to law practice, and reference important lawyering relationships, such as between lawyer and witness or lawyer and client. If questioning techniques are used in the context of problem solving, the techniques also align with advancing cognitive analysis ability. If students work in small groups to parse their questions, the exercise promotes collaborative competence, another skill of considerable value. Perhaps most important of all, the use of questioning techniques provides students with exposure to a skill that will serve them down the road as a lawyer, especially as a criminal lawyer.

